

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SERGIO CRUZ, [REDACTED]
an infant, by his father, IVAN CRUZ, SR.,
HORTENCIA CRUZ, AND
ROSA BORRERO,

Plaintiffs,

-against-

10 CV 5961 (RJD(LB))

THIRD AMENDED
COMPLAINT
AND DEMAND FOR
A JURY TRIAL

THE CITY OF NEW YORK, N.Y.C. POLICE
OFFICERS HAROLD AVALOS, SHIELD # 15321,
RAMON CABRAL, VICTOR FALCON, NELSON
SOTO, CHRIS FRISCHIA & XIANG LI, EACH
SUED INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY,

Defendants.

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1. This is an action for compensatory and punitive damages for violation of Plaintiffs' rights under the Fourth, Fifth Amendments and Fourteenth Amendment to the Constitution of the United States, and violation of New York State law, by reason of the unlawful acts of defendants.

JURISDICTION

2. This action is brought pursuant to 42 U.S.C. § 1983. Jurisdiction is founded upon 28 U.S.C. § 1343. Plaintiffs further invoke the pendent jurisdiction of this Court to hear and decide claims arising under state law pursuant to 28 U.S.C. § 1367. Venue is proper in this district under 28 U.S.C. § 1391(b) in that all claims arose in this district.

PARTIES

3. Plaintiffs are residents of Kings County, New York City in New York State.

4. At all times hereinafter mentioned, the Defendant Police Officers were employees of the New York City Police Department (HEREINAFTER REFERRED TO AS "N.Y.P.D.") acting within the scope and authority of their employment. They are being sued individually and in their official capacity as New York City Police Officers.

5. The Defendant CITY OF NEW YORK, (HEREINAFTER REFERRED TO AS "City"), was a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York, and as such maintained the New York City Police Department and employed the individual Defendants sued herein.

6. That upon information and belief the City was responsible for the training of its police officers.

7. That at all times herein the defendant, City, was negligent in the hiring, training, supervision, discipline, retention and promotion of the agents, servants and/or employees of the N.Y.P.D.

FACTS

8. On or about November 7, 2009, at approximately 9:30 P.M., Plaintiffs were at the home of Sergio Cruz located at 525 58th Street, in Brooklyn, New York.

9. At that time, the police were apparently called by Sergio Cruz's daughter-in-law, Levi Velez, who was married to his son, Ivan Cruz, Sr.

10. Ms. Velez had called the police alleging that her husband was in violation of an order of protection that had been issued requiring him to stay away from her.

11. Upon information and belief, one of the officers that arrived was defendant

Avalos, who was having an affair with Levi Velez.

THE ARREST AND ASSAULT OF SERGIO CRUZ

12. Sergio Cruz was standing in his front yard smoking a cigarette when the police began demanding that he open the door of his house to let the officers inside.

13. Sergio Cruz stated that he would only open the door if they had a warrant.

14. The officers began to curse and insult Sergio Cruz.

15. At that point, Ivan Cruz, Sr. and his son, [REDACTED] came out of the house.

16. One of the defendant officers began to strike Ivan Cruz, Sr. His 14-year old son, Ivan Cruz, Jr., begged them not to hit his father.

17. Sergio Cruz also asked the officers to stop, but the officer punched Sergio Cruz in the face and pepper-sprayed him in his eyes.

18. Sergio Cruz tried to tell the officers that he had a heart condition and high blood pressure, but they said “We don’t care”, and proceeded to arrest Sergio Cruz and charge him with Obstruction of Governmental Administration and Resisting Arrest.

19. The next day, while still in custody, Sergio Cruz was taken to Lutheran Hospital, to be treated for chest pain. He spent three days at the hospital before being sent back to court for arraignment.

20. Sergio Cruz was required to go to court numerous times to fight the criminal charges.

21. On May 26, 2010, all criminal charges were dismissed against Sergio Cruz.

THE ARREST AND ASSAULT OF [REDACTED]

22. Upon seeing his father being punched by a police officer, [REDACTED] tried to get in between his father and the police to prevent them from hitting him again.

23. But, the police officers grabbed him and one officer punched him in the face and stomach.

24. [REDACTED] was handcuffed and placed in a police car.

25. He was told to shut up or they were going to put two bullets in the back of his head.

26. After numerous court appearances, all criminal charges were dismissed against [REDACTED] on January 6, 2010.

THE ARRESTS OF HORTENCIA CRUZ AND ROSA BORRERO

27. Sergio Cruz's wife, Hortencia, and Rosa Borrero, Hortencia's sister, were also arrested.

28. They were falsely charged with felony assaults on the police.

29. Their cases were resolved with them consenting to Adjournments in Contemplation of Dismissal (ACDs) on May 26, 2010.

CONDITIONS PRECEDENT

30. On January 26, 2010 [REDACTED] served a Notice of Claim was served upon the Defendant New York City, setting forth:

- a) The name and post office address of the Claimant and his attorney;
- b) The nature of the claim;
- c) The time when, the place where, and the manner in which the claim arose;
- d) The items of damages and injuries sustained so far as practicable.

31. On June 4, 2010 Sergio Cruz, served a Notice of Claim was served upon the Defendant New York City, setting forth:

- a) The name and post office address of the Claimant and his attorney;
- b) The nature of the claim;
- c) The time when, the place where, and the manner in which the claim arose;
- d) The items of damages and injuries sustained so far as practicable.

32. The Notices of Claim was served upon the Defendant within 90 days after Plaintiffs' cause of action accrued.

33. Plaintiffs' 50-H depositions were conducted on June 15, 2010 (Ivan Cruz, Jr.) and July 15, 2010 (Sergio Cruz).

34. New York City and its Comptroller have failed, neglected and refused to pay, settle, compromise or adjust the claim of the Plaintiffs herein.

35. This action has been commenced within one year and 90 days after Plaintiffs's cause of action accrued.

36. Plaintiffs have duly complied with all of the conditions precedent to the commencement of this cause of action.

**FOR A FIRST CAUSE OF ACTION FOR
VIOLATION OF CIVIL RIGHTS
(AS TO ALL PLAINTIFFS)**

37. Plaintiffs reiterate and reallege the facts stated in the preceding paragraphs as if stated fully herein.

38. As a result of their actions. Defendants, under "color of law", deprived Plaintiffs of their right to freedom from deprivation of liberty without due process of law in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

39. Defendant subjected Plaintiffs to these deprivations of his rights either maliciously or by acting with a reckless disregard for whether Plaintiffs' rights would be violated by his actions.

40. As a direct and proximate result of the acts of Defendants, Plaintiffs suffered physical injuries, endured great pain and mental suffering, and was deprived of his physical liberty

**SECOND CAUSE OF ACTION
FOR VIOLATION OF CIVIL RIGHTS
(AS TO IVAN CRUZ, JR. AND SERGIO CRUZ)**

41. Plaintiffs reiterate and reallege the facts stated in paragraphs 1-43 as if stated fully herein.

42. As a result of their actions, Defendants, acting under "Color of law", deprived Plaintiffs of their right to freedom from the use of excessive force without due process of law in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

43. Defendants subjected Plaintiffs to these deprivations of his rights either maliciously or by acting with a reckless disregard for whether Plaintiffs' rights would be violated by his actions.

44. These Defendant officers either actively participated in the excessive force or were present and improperly failed to intervene to prevent other officers from using excessive force although they were in a position to do so.

45. As a result of the aforesaid occurrence, Plaintiffs suffered the damages and injuries aforesaid. All Defendants are liable for said damage and injuries.

THIRD CAUSE OF ACTION FOR MALICIOUS PROSECUTION
(AS TO SERGIO CRUZ)

46. Plaintiff reiterates and realleges the facts stated in the above paragraphs as if stated fully herein.

47. In instigating, ordering, validating, procuring and assisting in the arrest of Plaintiffs, Defendant officer, acting within the scope of his employment, "under color of law",

and on behalf of his employer, maliciously prosecuted Plaintiff without reasonable or probable cause and with full knowledge that the charges were false.

48. As a result of said abuse of process and malicious prosecution, Plaintiff was compelled to come to court. All charges were ultimately dismissed in plaintiff's favor.

49. As a result of the aforesaid occurrence, Plaintiff was caused to and did suffer the damages and injuries aforesaid. All Defendants are liable for said damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that this Court:

1. Enter a judgment that defendants, by their actions, violated Plaintiffs' rights under state law, and violated Plaintiffs' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and violated Plaintiffs' rights under State law; and,

2. Enter a judgment, jointly and severally, against Defendants, and The City of New York for compensatory damages in the amount of FIVE HUNDRED THOUSAND (\$500,000.00) Dollars; and,

3. Enter a judgment, jointly and severally against the Defendant officers for punitive damages in the amount of ONE MILLION (\$1,000,000.00) Dollars; and,

4. Enter an Order:

a) Awarding Plaintiffs' reasonable attorney's fees and litigation expenses pursuant to 42 U.S.C. § 1988;

b) Granting such other and further relief which to the Court seems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Dated: New York, New York
August 7, 2012

RESPECTFULLY,

/s/

STEVEN A. HOFFNER, ESQ.
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(SH-0585)

VERIFICATION

STEVEN A. HOFFNER, an attorney admitted to practice in the Courts of the State of New York states:

That the affirmant is the attorney of record for the Plaintiffss in the within action.

That the affirmant has read the foregoing Complaint and knows the contents thereof.

That the same is true as to affirmant's knowledge, except as to matters therein alleged to be on information and belief, and as to those matters affirmant believes them to be true.

That the reason this verification is made by affirmant is because the Plaintiffs do not reside in the county wherein affirmant maintains his office.

That the grounds of my belief as to all matters not stated upon my own knowledge are as follows:

investigation, client conferences, and review of the file.

The undersigned affirms that the following statements are true, under the penalties of perjury.

Dated: New York, New York
August 7, 2012

/s/
STEVEN A. HOFFNER, Esq.